

MEMO# 35374

July 13, 2023

FTC Proposes Revisions and Additional Information Requirements for Hart-Scott-Rodino Filings

[35374]

July 12, 2023

TO: SEC Rules Committee RE: FTC Proposes Revisions and Additional Information Requirements for Hart-Scott-Rodino Filings

On June 28, the Federal Trade Commission (FTC) issued a proposed rule to amend the Hart-Scott-Rodino (HSR) premerger notification rules to reorganize and add new information and documentation requirements for HSR filings.^[1] The proposal would not expand the scope of "person" that is required to submit a filing, but it would significantly increase the amount of information that a would-be filer, as determined by existing HSR thresholds and scope of filing "person,"^[2] must include in its filing in several respects. This proposal, therefore, differs from the FTC's 2020 aggregation proposal, which would significantly expand the scope of what constitutes an acquiring person that is subject to HSR filing requirements.

The FTC believes that the information requirements under the current HSR form are "insufficient" to enable a thorough review of a proposed transaction, given in part that transaction structures have become more complex.^[3] The proposed additional information requirements seek to address this perceived shortcoming.

Comments to the proposal are due on August 28 and ICI is analyzing the proposal to identify any potential impacts on regulated funds and advisers. We summarize below certain portions of the proposal, with a focus on the additional information that would be required.

Additional Information Required for Acquiring Entities

In addition to reorganizing existing required information elements,^[4] the proposal would require additional information in an HSR filing about how an ultimate parent entity is organized, including the identities of other individuals and entities that "may have influence over business decisions or access to confidential business information," even if they are not part of the transaction.^[5]

First, an acquiring person would need to report certain minority shareholders (5% or more, but less than 50%) of (1) the acquiring entity; (2) any entity directly or indirectly controlled

by the acquiring entity; (3) any entity that directly or indirectly controls the acquiring entity; and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction.[\[6\]](#) Acquired persons would be subject to more limited reporting requirements.[\[7\]](#)

An acquiring person would also be required to identify certain individuals (other than the acquiring person's employees) or entities that, in relation to the acquiring entity or any entity it directly controls or is controlled by, (1) provide credit; (2) hold non-voting securities, options, or warrants;[\[8\]](#) (3) are board members or board observers, or have nomination rights for board members or board observers; or (4) have agreements to manage entities related to the transaction.[\[9\]](#)

Further, an acquiring person (and acquired entity as applicable) would be required to identify the officers, directors, or board observers of all entities within the acquiring person and acquired entity, as well as identification of other entities for which such individuals currently serve, or within the two years prior to filing had served as an officer, director, or board observer. The FTC states that this information would help it to become better aware of existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships under the Clayton Act.[\[10\]](#)

Additional Information Required for the Transaction

The proposal would also reorganize existing information requirements and require new additional information in an HSR filing about the nature of the transaction.[\[11\]](#) This additional information, among other items, includes a brief description from the acquiring person about the business operations of all entities within the acquiring person; and a narrative that identifies and explains each strategic rationale for the transaction.[\[12\]](#)

Additional Information Required for Competition and Overlaps

The proposal would also reorganize existing information requirements and require additional information in an HSR filing about existing business relationships between the acquiring and acquired persons. The additional information, among other items, includes details from the acquiring person about entities that it controls that have the same NAICS code as the acquired entity,[\[13\]](#) as well as further details on prior acquisitions that are consistent with existing reporting requirements.[\[14\]](#)

The FTC also proposes to amend some existing requirements related to minority-held entity overlaps. Item 6(c) of the HSR form currently requires filing persons to list all of the entities in which the acquiring person and associates of the acquiring person, or the acquired entity (as appropriate) holds a minority interest of 5% or more; however, the form specifies that a filer should limit this list to entities that, to the filing person's knowledge or belief, would derive revenue in the same NAICS codes or have operation in the same industry as the acquired entity. The proposal would eliminate the option of listing all of the minority-held entities of the acquiring person and its associates or acquired entity (as appropriate), regardless of whether they share a NAICS code or operate in the same industry.

Notes

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) ("Proposal"), available at <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf>. The information required to be included in an HSR filing is set forth in the General Instructions to the HSR form. The proposal would also implement the Merger Filing Fee Modernization Act of 2022, which increased HSR filing fees for certain large-sized transactions.

[2] Existing HSR rules limit an acquiring "person" to entities under common control. For example, an acquiring person could include (1) the entity that proposes to acquire the voting securities (of the acquired person) in the transaction; (2) its "ultimate parent entity" ("UPE"); and (3) any entity controlled by the ultimate parent entity, i.e., "affiliates." A UPE is the company, individual, or other entity that controls a party to the transaction and is not itself controlled by anyone else. An acquiring person is typically at the single fund level.

[3] The FTC notes that transactions may involve more related entities than a UPE and its acquiring entity. Further, the FTC believes that related entities can exercise influence over a transaction even without being directly involved. The FTC specifically notes that such entities can exert influence over a transaction or a company's strategy by providing subsidies and loans to an acquiring party or using board observers. Proposal at 42179.

[4] For example, filers would need to organize their list of controlled entities by operating company or business under a section called "Entities Within the Acquiring Person and Acquired Entity." The FTC states that this approach would help it understand which companies are part of an operating group or portfolio company, which would help it identify the actual market participants from among all legal entities. Proposal at 42187.

[5] Id.

[6] This reporting elements would include identifying both (1) funds holding minority interests that sit between a UPE and an acquiring entity in an ownership structure and (2) limited partners and general partners in a limited partner structure. Id. Current HSR information requirements on minority shareholders are limited to identification of (1) the minority shareholders of the acquiring UPE and the acquiring entity (by the acquiring person); and (2) the acquired entity(s) by the acquired person. See Item 6(b) of the HSR form.

[7] This information would be included in a section called "Minority Shareholders and Non-Controlling Entities."

[8] Holders of non-voting securities, warrants or options would be limited to those the value of which equals or exceeds 10% of the entity or could be converted to 10% or more of the voting securities or non-corporate interest of the company.

[9] This information would be included in a section called "Other Types of Interest Holders that May Exert Influence."

[10] Proposal at 42189.

[11] This information would be included in a section called "Transaction Information."

[12] Other additional required information includes a transaction diagram, a term sheet or

draft agreement that reflects sufficient detail about the proposed transaction, all agreements related to the transaction, other agreements between the acquiring and acquired persons that are not related to the transaction, and a timetable for the transaction.

[\[13\]](#) This information would be included in a section called "Controlled-Entity Overlaps."

[\[14\]](#) Item 8 of the current HSR form requires the acquiring person to identify all NAICS codes in which the acquiring person derived \$1 million or more in revenue and the acquired entity(s) or assets also derived \$1 million or more. The FTC proposes to have both the acquiring and acquired person report this information, extend the timeframe for reporting prior acquisitions from 5 years to 10 years, and eliminate the existing thresholds for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than \$10 million in the year prior to the acquisition.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.